As above, so below: reconciling the natural world and human rights in Canada

Margherita Paola Poto*[1]

Abstract

The article offers an overview of the current legal debate in Canada on constitutional coverage for environmental rights, intended as the rights that are to be shared in equal measure by the natural world and the human communities, with a consequent set of duties for public and private parties to protect them, as well as a set of responsibilities in case of their infringement.

The study is structured into two parts: The first part of the article deals with the 'why' to embark on constitutional reform and the second part deals with the 'how' to do it. Consequently, the first part analyses the pros and the cons of the environmental rights' constitutional enshrinement, first by describing the current legal situation in Canada when it comes to environmental protection and, secondly, by referring to some virtuous cases where the environmental rights have been successfully included in the constitutional framework and are in the process of being implemented (Norway, Bolivia, Ecuador).

The second part of the article analyses a case study on the aboriginal community of Secwépemc, as an example of aboriginal grassroots movement that encourages a more stringent system of guarantees at constitutional level, in order to facilitate the process of nature conservation, human rights restoration and legal harmonisation in the diversified and pluralistic tissue of Canadian society.

The research is based on an integrated approach tackling both the top-down perspective and the bottom-up consideration of the grassroots initiatives that led to successful results of local participation, integration and indigenous rights' restoration in the fabric of the pluralistic Canadian society.

1* Postdoctoral Fellow, K. G. Jebsen Centre for the Law of the Sea (JCLOS), UiT, Tromsø, Norway. The article was written during a month of Visiting Scholarship at the Faculty of Law, University of Victoria (UVic), British Columbia, Canada. The research abroad was funded by the Terry and Valery Stadler Jakobsen Research Foundation for UiT, Tromsø, Norway. The author is grateful to the Indigenous Law Research Unit Team at the UVic and especially to Jessica Asch for the retrieval of data on the Secwépemc community; to Georgia Lloyd Smith for her supportive attitude and her generosity in sharing her experience as First Nation's lawyer; to Alan Hanna for the inspirational conversation and his wonderful suggestion to define the natural world in terms of relationships rather than resources; to Prof. Rebecca Johnson for opening up the doors to new ways of welcoming visitors. The title is a tribute to the teachings of Francesca Casciello.
Correspondence: margherita.p.poto@uit.no.

1. Introductory remarks

This article offers an overview of the current legal debate in Canada on the need to provide constitutional coverage for environmental protection, in order to guarantee legal harmonisation within the rich pluralism of federal, provincial, aboriginal and indigenous laws that is the intrinsic value of Canadian society. The terms of the debate are described and complemented by the analysis of some comparable legal systems where protection of the natural world has already been incorporated in the highest laws, as well as by the description of a well-governed aboriginal community, where the environmental and participation principles are the lifeblood of societal rules. A transformative and effective process of converting aboriginal principles into constitutional rights and duties and their application to the entire nation would contribute to healing old and new wounds which human action has already caused and is likely to cause in future to nature and to the peoples whose survival is intimately connected to natural cycles.

A constitutional provision in the Canadian legal regime would meet different yet equally fundamental needs. First, it would envision and strengthen the protection of fundamental rights and duties respectively recognised to natural commons and native peoples on the one hand and to the individual and collective persons that are likely to cause damage to the natural world on the other hand. Secondly, it would contribute to harmonising the current heterogeneous legal framework encompassing federal, provincial and aboriginal territories under one common regime of protection.

The former element, that is to say the need to set up fundamental rights for both nature and human beings, is anchored on the assumption that the natural diversity of commons is to be shared by the community as a whole, in an inclusive manner, that comprises the natural landscapes, water resources, animals and plants as the beneficiaries of the highest protection and that holds the central and local communities, as well as the individuals, accountable for the protection of the common natural heritage.

On the latter element, it is worth noting that the codification of duties and responsibilities is likely to encourage the process of reconciliation between the

Canadian state and the aboriginal peoples. The first part of the article deals with the 'why' to embark on constitutional reform and the second part deals with the 'how' to do it and, in this regard, it appears to be necessary to restore ancestors' and elders' principles and to acknowledge the primacy and uniqueness of their connection with Planet Earth.

In more detail, the first part of the article analyses the pros and the cons of the environmental rights' constitutional enshrinement, particularly looking at the indicators offered in David Boyd's study.[2] In particular, the author includes, among the potential benefits of the rights to a healthy environment:

- stronger environmental laws and policies
- improved implementation and enforcement
- greater citizen participation in environmental decision-making
- increased accountability
- a reduction in environmental injustices
- a level playing field with social and economic rights
- better environmental performance.[3]

Among the criticisms addressed by the detractors of the reform, Boyd lists the objections that the constitutional rights in the constitution tend to be too vague and redundant, that they constitute a threat to democracy because they shift power from elected legislators to judge and that they are not enforceable and therefore likely to be ineffective.[4]

The reference to the virtuous examples where environmental rights have been already enshrined in the constitutional framework could be a good answer to the detractors of the environmental rights' constitutionalisation: as an example, in Norway, the right to a healthy environment has been accompanied by the provision of the responsibility of the state in case of violation (Article 110); in Ecuador and Bolivia, the rights of Mother Earth have been respectfully protected in the Constitution (2008) and in the laws (2009), and in general the rights and duties of the land are accompanied by rights and duties of the indigenous peoples.

In this sense, the suggestion offered by the article goes beyond David R Boyd's position and looks further towards the Latin American approach: a transformative and progressive reform should aspire to codify the general fundamental rights and duties respectively for the environment and the human beings to be protected, as well as the duty for both public and private parties to be held accountable in case of legal violations.

The second part of the article describes the example of the Secwépemc community in Canada as a best practice model of community participation, which could not only eventually be used as a paradigm for similar cases by the means of a constitutional provision but could also provide the terms of reference for the Constitution. A comprehensive approach, where top-down and bottom-up initiatives complement each other and where social and participatory rights are instrumental in environmental protection is preferred to a uni-directional and centrally-directed intervention: the ideal reform would encompass and encourage the formulation of integrating norms to help ensure that conservation practices respect the fundamental rights both of human beings and nature.

A constitutionalisation of the founding principles of aboriginal communities could be a good starting point not only for a shift in terminology but also for completing the process of restoration of historic wounds and violations.

The case of the Secwépemc community in Canada will be used as the scholium that highlights the importance of providing constitutional protection to the natural world's rights, as well as establishing societies' duties towards them, based on the assumption that the only way effectively to repair ancestral traumas can be followed by adopting the elders' wisdom as the founding pillars of the newly established environmental protection.

Indigenous wisdom addresses the founding principles that are to be ranked at constitutional level, in order to rebalance the system violently threatened and, in some cases, irreparably damaged. It is a moral duty and a crucial opportunity offered to the Canadian state: to learn from the elders' wisdom and use such wisdom to heal the wounds of the past.

In the final concluding remarks, it will be assessed whether the codification of grassroots initiatives could be helpful to spread their benefits to a larger scale and therefore to overcome the drawbacks that part of the scholarship foresees in the codification of environmental rights. For now, however, it is worth anticipating that the character of Canadian pluralism offers a unique occasion to institutions, legislators and decision-makers to step forward in the protection of the environment, with a provision that could acknowledge the work done so far by the courts and by the local communities and mark a milestone in preventing future recurrences of environmental threats and human rights infringements.

2 David R Boyd 'The constitutional right to a healthy environment' (2012) 54(4) *Environment, Science and Policy for Sustainable Development* 3 http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html.

3 David R Boyd *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press 2012).

4 ibid.

2. Canadian environmental protection

The Canadian Charter of Rights and Freedom, the bill of rights entrenched in the Constitution of Canada approved in 1982,[5] does not have any explicit provisions regarding the protection of the environment nor does it officially acknowledge any connection between the natural resources and the native peoples whose survival is deeply related to natural protection. The legal detractors of the explicit recognition of rights and duties for the natural world and public and private persons claim that these rights are implicitly protected and already recognised under different provisions: the right to life (section 7[6]) and aboriginal rights (section 35[7]).

In the following paragraphs I will recollect the mainstream opinions of the scholarship that demonstrate how important it is to have a systematic and comprehensive protection system, where the environment (with sets of rights and duties) and the peoples (native and non-native) interrelate thanks to a sound system of relationships, deeply anchored in a constitutional provision.

David R Boyd has emphasised the need to entrench environmental protection in the constitution, sharing the concept that the Constitution is the supreme law, which aligns all the other legal provisions and reflects the nation's most cherished values, 'acting as a mirror of a country's soul'.[8]

There is another strong reason for the importance of enshrining environmental rights in the constitutional framework of a country and to connect them to the rules on the active participation of the civil society, and especially on the portion of society whose survival depends on nature, becoming an integral as well as accountable part of such protection. The reason to connect such a protection of the natural world with the participation of native peoples' participation lies in the ultimate recognition that they effectively and naturally belong to the world that has to be protected in a more stringent measure because it has been gravely destroyed and damaged. It is a component – although only formal – that has to be paid for the heinous violations against the aboriginal inhabitants of the land.

2.1 Why section 35 of the Constitution 1982 is not sufficient to reconcile the aboriginal peoples and the Canadian state

As stated above, the Canadian Constitution of 1982 generally protects aboriginal rights in section 35, establishing a connection between Canadian law and aboriginal rights, through treaty rights:

> 35 (1) The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.
> (2) In this Act, 'Aboriginal Peoples of Canada 'includes the Indian, Inuit, and Métis Peoples of Canada.
> (3) For greater certainty, in subsection (1), 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Kiera L Ladner, although recognising that such a provision played a very important role in the reconciliation process of the aboriginal peoples and constitutional sovereignty, argues that such instrument does not offer a sufficient system of protection by itself and therefore it requires a long and articulated process of interpretation, implementation and dialogue between the parties.[9]

The author continues by affirming that, despite the remarkable achievement in terms of formal recognition of the aboriginal rights, section 35(1) does not guarantee a substantive protection to the aboriginal peoples, because it does not offer a systematic framework, relying on further actions of negotiations, judicial interpretation and dialogue between the different jurisdictions:

> [t]here exists a great need to reconcile these contested sovereignties and the resulting competing constitutional orders. Recognition – explicit or implicit – does not make for good governance and smooth transitions between jurisdictions, especially when jurisdictions will continue to be claimed by a number of different constitutional orders with the likelihood of multiple spheres of jurisdiction occupying the same territory. Constitutional orders will have to be accommodated and jurisdictions will need to be reconciled through negotiation, judicial interpretation,

5 See http://laws-lois.justice.gc.ca/eng/Const/page-15.html.

6 Section 7 of the Constitution affirms that: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

7 According to Section 35: ' (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, *'aboriginal peoples of Canada'* includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) *'treaty rights'* includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons'.

8 Boyd *The Right to a Healthy Environment. Revitalizing Canada's Constitution* (n 4). See also Lynda M Collins 'Safeguarding the *longue durée*: environmental rights in the Canadian constitution' (2015) *Supreme Court Law Review* 71 http://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/20.

9 Kiera L Ladner 'Take 35: Reconciling constitutional orders', paper presented at the 78th Annual Conference of the Canadian Political Science Association (York, 1–3 June 2006) https://cpsa-acsp.ca/papers-2006/Ladner.pdf.

> constitutional dialogues between governments and the courts, and consensual constitutional change or deviation. Legal and political dialogue will be necessary. As will a formal process of constitutional reconciliation[10].

Along the same lines, Patrick Macklem points out how important it is to provide constitutional protection of the relationship between the Canadian state and the aboriginal peoples. He roots his argumentation in the fact that the Canadian constitutional order has been consolidating on the Western European view that regarded aboriginal nations as insufficiently civilised to merit membership in the community of nations. Such conviction must be uprooted and the only way to succeed properly in the process is by recognising constitutional significance of indigenous difference.[11]

To the fragmentary nature of section 35 protection lamented by Keira L Ladner and Patrick Macklem should be added the doubt on the legitimacy of a court interpretation that could possibly connect the indigenous rights with the environmental protection. The letter of the law is silent with regard to the vital link between the natural world and indigenous rights and this lacuna could hardly be overcome by a jurisprudential interpretation without the risk of ruling beyond the constitution. Yet, the connection between nature and indigenous peoples is vital, if we consider that the basis for any speculation of indigenous rights is the recognition of the self-determination principle, which expressly acknowledges the unique connection between the peoples and the territory in which they live.

Among the supporters of the centrality of self-determination in any assertion on indigenous fundamental rights, Peter Manus develops the idea that indigenous peoples live in their land in the most sustainable way, with their delicate and light respect of natural resources:

> Prominent among the various rationales for disregarding or terminating an indigenous people's territorial rights is the fact that indigenous peoples tend to live lightly on the land, and thus do not produce through their lifestyles the kind of evidence of dominion that European-rooted cultures are willing to recognize as worthy of legal protection. In other words, the legal and political vulnerability of indigenous peoples rests heavily on the fact that indigenous life patterns are, generally speaking, environmentally benign, and so differ fundamentally from those of the dominant cultures whose laws, moral codes, and life patterns are, generally speaking, environmentally exploitive.[12]

Thus, environmental values of indigenous peoples are not merely a distinguishing feature of their cultures; they are a key element of their disenfranchised status.

The underlying theme in the acknowledgement of their participatory rights is that the indigenous people' respectful, deep yet invisible connection with the land they originally inhabited is to be preserved, since it fulfils the purpose of a sustainable bond between humankind and nature.

Self-determination, in its very essence, expresses the linking component between the indigenous groups and the natural world: it is the founding principle of the indigenous fundamental rights and, at the same time, it acknowledges the intimate connection between peoples and nature as the scope of protection.

2.2 Activism around the constitutionalisation of environmental rights and duties in Canada

It is worth recalling that the constitutionalisation of environmental rights has been advocated beyond academic walls. While no mainstream political party in Canada is advocating for extending such rights to environmental bodies, environmental organisations have been pushing the idea. The David Suzuki Foundation, a science-based environmental organisation headquartered in Vancouver, British Columbia, is one of the most active organisations in this regard. Citing the Supreme Court of Canada, it recently affirmed that integrating indigenous legal concepts into Canadian law is vital for reconciliation efforts.[13] The activity of supporting environmental rights has come a long way. Since 2014, more than 107,000 Canadians have signed up in support of environmental rights. Volunteers have helped to pass municipal resolutions across the country, and now more than 40 per cent of people in Canada live in a municipality that supports the right to a healthy environment. Such an achievement can certainly be ascribed as a comforting symptom of a rising awareness of the population of the need to provide legal coverage for environmental rights, which gives hope that the academic debate is not sterile after all.

3. Good examples from abroad: on the Norwegian inclusive approach at constitutional level

Norway can be cited as the first example of constitutionalisation approximation process, since its Constitution was amended twice to include the environment at the highest level of protection, as well as

10 ibid.

11 Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press 2001) 288.

12 Peter Manus 'Sovereignty, self-determination, and environment-based cultures: the emerging voice of indigenous peoples in international law' (2003) 23 *Wisconsin International Law Journal* 553.

13 See http://www.davidsuzuki.org/.

to envision the responsibility of the state in cases of infringement. Such a process was encouraged by the commitment to implement the Convention on Biodiversity. Following the chronology of the constitutional reforms, it is worth mentioning the adoption of Article 110B in the Constitution in May 1992. In particular, the second season of reforms was inaugurated after the opening of the United Nations Conference on Environment and Development in Rio de Janeiro, where important international instruments such as the Rio Declaration, Agenda 21 and the Convention on Biodiversity were adopted.[14] Article 110B was amended in 2014 and adopted as Article 112.[15]

Both Articles 110B and 112 provide substantial rights to a safe environment and reflect both the principle of sustainable development and the precautionary principle as the articles require a comprehensive long-term use of natural resources to safeguard future generations.[16] Although predating the Convention on Biodiversity, the wording of the article demonstrates that it is inspired and reflects legal developments within international environmental law through its references to environmental principles of international law and concepts such as nature diversity and the inherent values of nature.

The constitutional article on environmental protection has had a legal significance within the Norwegian legal system, beyond the CBD implementation and is thus more than a mere political symbol. First, it contains legal duties for the *Stortinget* (the Norwegian Parliament) as a legislator. It is the duty of the legislative body to approve laws that provide for protection of biological diversity and that endorse the right of environmental information or participation for citizens. If the Parliament fails to comply with the constitutional principles, the courts may set the legislation aside as unconstitutional through judicial review of the legislation.[17] Further, the provision grants the protection of the environment in the Constitution and is therefore relevant as a consideration, both in the interpretation of legal provisions and in their administrative enforcement. If the administration fails to take into account environmental considerations that are protected in the Constitution, the decision may be held invalid by the courts.[18]

In line with such a relevant achievement at the constitutional level, environmental protection was further strengthened by the approval of the Nature Diversity Act,[19] which entered into force on 1 July 2009. The Act was developed thanks to an intensive consultation process with all of the relevant economic sectors, as well as the Sami Parliament, as representative of indigenous groups in Norway. The major aim was to protect biological, geological and landscape diversity, as well as the ecological processes through the conservation and sustainable use of natural resources.

The Nature Diversity Act is based on the core principle of the CBD mentioned above, that is to say on the intrinsic value of biodiversity: its ample and rich purposes definition in section 1 shows the outreach of biodiversity protection, which lies in the concept of sustainability itself: the environment has to provide a basis for human activity, culture, health and well-being, now and in the future, including a basis for Sami culture. Moreover, the cross-sectoral trait of the Nature Diversity Act is noteworthy, since its purpose and general provisions apply to all the sectors and regulatory provisions involving decisions on biological diversity.

The system built up around the Nature Diversity Act is based on a good governance approach, where on the one hand the widest access to all the relevant information must be granted to interested parties and, on the other hand, all of the interested parties have the duty to inform the relevant authorities of any project that affects protected areas and protected species.

Both the constitutional reforms and the approval of the Nature Diversity Act show how Norway has given a wide and comprehensive connotation to environmental protection, by stating its constitutional value and by facilitating the creation of a good governance platform, where all the interested parties, including local and other relevant authorities and indigenous peoples are engaged.

4. The Bolivian legal regime

Bolivia and Ecuador have gone a long way towards granting legal coverage to environmental protection and have enshrined laws on the rights of the natural world in their constitutions.[20]

14 See https://www.cbd.int/.

15 Innst 187 S (2013–2014). See also Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra menneskerettighetsutvalget om menneskerettigheter i Grunnloven, 245–46. The preparatory works are partially available in English at http://www.hoelseth.com/grunnloven/#preparatory

16 See Hans Christian Bugge, Environmental Law in Norway Kluwer Law International; 2nd Revised ed. edition (April 7, 2011), p. 31.

17 ibid 32.

18 ibid.

19 Lov om forvaltning av naturens mangfold (naturmangfoldloven) (in Norwegian) https://lovdata.no/dokument/NL/lov/2009-06-19-100. A translation for information use only is available at https://www.regjeringen.no/en/dokumenter/nature-diversity-act/id570549/: Act of 19 June 2009 No 100 Relating to the Management of Biological, Geological and Landscape Diversity (Nature Diversity Act).

20 Almut Schilling-Vacaflor 'Bolivia's new constitution: towards participatory democracy and political pluralism?' (2011) 90 *European Review of Latin American and Caribbean Studies* 3.

The choice to analyse the legal framework of Bolivia and Ecuador is based on the distinction of Roque Roldán Ortega, who differentiates between countries with a 'superior legal framework' (Bolivia is listed among them) and 'countries with a legal framework in progress' (Ecuador was listed among them at the time of the publication).[21] The former group of countries have made a high-level commitment to indigenous rights, both in their constitutions and in implementing international agreements (such as the ILO Convention No 169[22]) and have effectively enforced such provisions with a regulatory framework and concrete actions to implement those rights, including the legal recognition of indigenous lands. This group includes Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay and Peru. The latter group has a high-level commitment, but it is still working on the implementing actions. As will be further explained, in respectively 2009 and 2008, Bolivia and Ecuador have taken a major step forward in the recognition of fundamental rights and duties, connecting environmental protection to indigenous rights and in general to a set of rights and duties that binds the parties in the common effort to protect the planet and its biodiversity.

Both Bolivia and Ecuador approved new constitutions (respectively in February 2009 and in September 2008) that have been classified as 'pluri-national constitutions'[23] and have the common traits of having incorporated and enhanced human rights by focusing on new participatory mechanisms.

In particular, the Bolivian Constitution strengthens the mechanisms of participatory democracy, recognising enhanced social rights, and aiming to establish a pluri-national and intercultural state.[24] One of its primary objectives is to redefine relations between the state and an ethnically pluralist civil society, offering civil society the right to have a say in state politics. For these reasons, Bolivia's Constitution is considered among the most advanced and transformative pieces of legislation when it comes to social inclusiveness and participation.

In its introductory provisions, the Bolivian Constitution acknowledges the pre-colonial existence of nations and rural native indigenous peoples, their ancestral control of their territories and their free determination, consisting of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, which is guaranteed within the framework of the unity of the state, in accordance with the constitution and the implementing laws (Articles 1 and 2). As an essential complement of such recognition, the Bolivian Constitution recognises the Bolivian citizenship of all Bolivians, the native indigenous nations and peoples, and the inter-cultural and Afro-Bolivian communities that, together, constitute the Bolivian people (Article 3), and consequently confers the status of official languages to all the idioms of the rural native peoples (Article 5).[25] Moreover, the pluri-national government and the departmental governments must use at least two official languages. One of them must be Spanish, and the other will be determined taking into account the use, convenience, circumstances, necessities and preferences of the population as a whole or of the territory in question. The other autonomous governments must use the languages characteristic of their territory, and one of them must be Spanish.

Such close attention to the pluri-national characteristics of the state are then further confirmed in Part III, Title I, Chapter VII, dedicated to the rural native indigenous autonomy and consequently to the protection of the right to culture and self-governance and in Part IV, Title II, entirely dedicated to the environmental protection of Natural Resources, Land and Territory. In particular, Article 342 envisages the duty of the state and of the population to conserve, protect and use natural resources and biodiversity in a sustainable manner, as well as to maintain the equilibrium of the environment. The close connection between the duty to preserve the environment and the civic engagement of society in environmentally-related decisions is stated in the following Article 343, which establishes the right of all the population (and therefore of both non-indigenous

21 Roldán Ortega (n 2) 2–3.

22 International Labour Organisation Convention No 169 (27 June 1989) www.ilo.org/indigenous/Conventions/no169/ lang–en/index.htm. See also Joint Publication of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Asia Pacific Forum of National Human Rights Institutions (APF) 'United Nations Declaration on the Rights of Indigenous Peoples: A manual for national human rights institutions' www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf. For an historical perspective and a reconstruction of the indigenous peoples' identity see R L Barsh 'Indigenous peoples: an emerging object of international law' (1986) 80(2) *American Journal of International Law* 369. See also 'Study of the problem of discrimination against indigenous populations' UN Doc E/CN.4/ Sub.2/1983/21/Add.8, para 633.

23 Raquel Yrigoyen Fajardo (ed) *Pueblos Indígenas: Constituciones y Reformas Políticas en América Latina* (IIDS 2010).

24 https://www.constituteproject.org/constitution/Bolivia_2009.pdf.

25 According to Art 5 of the Bolivian Constitution, the official languages of Bolivia are Spanish, Aymara, Araona, Baure, Bésiro, Canichana, Cavineño, Cayubaba, Chácobo, Chimán, Ese Ejja, Guaraní, Guarasu'we, Guarayu, Itonama, Leco, Machajuyai-kallawaya, Machineri, Maropa, Mojeñotrinitario, Mojeño-ignaciano, Moré, Mosetén, Movima, Pacawara, Puquina, Quechua, Sirionó, Tacana, Tapiete, Toromona, Uruchipaya, Weenhayek, Yaminawa, Yuki, Yuracaré and Zamuco.

and native groups, according to the categorisation in Article 3 previously mentioned) to participate in environmental management, and to be consulted and informed prior to decisions that could affect the quality of the environment.

The responsibility of public and private persons is further illustrated in Article 347, which also includes in the broad category of environmental duties the duty to mitigate the harmful effects of human activities on the environment and of the environmental contamination and damage that affect the country, and states the need to define liability rules in case of damage to historic environments; additionally, the provision enumerates the obligations to avoid, minimize, mitigate, remediate, repair and make compensation for the harms caused to the environment and the health of persons, for all who carry out activities that impact the environment.

Section 1 Chapter VII is then entirely dedicated to the protection of biodiversity, and it confers the status of 'natural assets' to all the native animals and vegetal species, therefore differentiating them from the natural resources and consequently implying the duty for the state to regulate and limit their exploitation. In particular, Article 381 affirms the duty on the state to establish the measures necessary for conservation, exploitation and development of native animals and vegetal species, as well as the state's duty to protect all genetic and micro-organic resources, which are found in the ecosystems of the territory, and the knowledge associated with their use and exploitation. For their protection, a system of registration that safeguards their existence will be established, as well as a registry of the intellectual property in the name of the state or the local individuals who claim it. There is also provision for procedures that guarantee equal protection for all of the non-registered resources.

Two brief comments are necessary on these advanced and almost unique constitutional provisions, which have undoubtedly formed a solid basis for the advanced law on the protection of natural rights, approved in 2009 and in force since 2012. The first comment is that there was a need to predefine an equality of rights and duties for both the native and non-native populations, and consequently to extend to all Bolivian society the fundamental right to participate in environmental decisions as innate for their self-determination and self-governance. The second remark deals with the distinction between natural resources that – although in a limited and balanced manner – can be used and exploited as 'natural assets' but which, because of the original and unique connection with the land, cannot be exploited and must be protected and preserved.

The Bolivian law on the rights of the natural world,[26] which followed the constitutional reforms in 2009, has been heavily influenced by a resurgent indigenous Andean spiritual world view which places the environment and the earth deity known as the Pachamama, the goddess revered by the indigenous of the Andes, at the centre of all life. Humans are considered equal to all other entities and Planet Earth is therefore protected in the most inclusive way, which comprises native animals and vegetal species, as well as the population.

In particular in its introductory articles (Articles 1–6), the Bolivian law formulates the founding principles that recognise the rights of Mother Earth (Pachamama) and the consequent obligations of the pluri-national state and society to ensure respect for these rights. Such principles include:

1. harmony, as the need to balance human activities, within the framework of plurality and diversity, with natural cycles and processes
2. the need to protect the supreme interest of collectivism over individual rights
3. the need to guarantee the regeneration of the diverse living systems, by ensuring that they absorb damage, adapt to shocks, and regenerate without significantly altering their structural and functional characteristics, and by recognising that living systems are limited in their ability to regenerate, and that humans are limited in their ability to undo their actions
4. the duty of the state and of any individual or collective person to respect, protect and guarantee the rights of Mother Earth for the well-being of current and future generations
5. the need to prevent commercialism of living systems and processes that sustain them
6. the need to promote multiculturalism in the recognition, recovery, respect, protection, and dialogue of the diversity of feelings, values, knowledge, skills, practices, skills, transcendence, transformation, science, technology and standards, of all the cultures who seek to live in harmony with nature.

In Article 3, the planet is described in a comprehensive manner as the dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, sharing a

26 Law 071 of the Plurinational State discussed by Bolivia's Plurinational Legislative Assembly in December 2010, entered into force in October 2012.

common destiny. Mother Earth is considered sacred, from the world views of nations and peasant indigenous peoples. According to Article 5, to Mother Earth is ascribed the characteristic of entity with a collective public interest; therefore Mother Earth and all its components, including human communities, are entitled to all the inherent rights that the Law recognises to them. Article 6 provides a suggestion on the way to guarantee the correct exercise of the rights of the natural world, by stating that any conflict of rights must be resolved in ways that do not irreversibly affect the functionality of the living systems.

Chapter 4 is therefore dedicated to listing the state obligations and societal duties with regard to the protection of such rights. In particular, the state is required to develop policies and systematic actions of prevision, protection and precaution in order to prevent the extinction of living populations, the alteration of natural cycles and processes and the safeguarding of the regenerative capacity of natural cycles, processes and vital balances. Such obligations are to be fulfilled by the pluri-national state in its multilateral, regional and bilateral international relations.

Among the duties of the population are active participation, individual or collective, in generating proposals designed to respect and defend the rights of Mother Earth. Such a proposition marks a milestone in the development of the participatory rights related to the environment, of the same magnitude as the shift of the definition from natural resources to native assets. Here there is no question about the need to provide participatory rights for everybody, since the law not only regards it as a vested right but goes further by anchoring it to the accountability of society, which has a duty to take part in decisions that affect the planet.

In line with such set of accountability prescriptions, there is the duty to report any act that violates the rights of Mother Earth, living systems, and/or their components, as well as to attend any decision-making processes initiated by competent authorities or organised civil society to implement measures aimed at preserving and or protecting Mother Earth.

5. Ecuador: the celebration of Pachamama

As mentioned above, the Ecuador Constitution was approved in 2008. Although it does not provide the same guarantees as the Bolivian Constitution to the point of expressly acknowledging the status of the Ecuadorean population to the indigenous groups, and therefore their equal rights towards the planet, after having celebrated in its preamble 'the nature, the Pachamama, of which we are a part and which is vital to our existence', it expressly states at the constitutional level the fundamental rights of Mother Earth.

Chapter 7 recognises the right of Pachamama to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality will be able to demand the recognition of rights for nature before the public organisms. The Constitution envisions a duty for the state to undertake actions involving natural and juridical persons in such an effort; as well as to promote respect towards all the elements that form an ecosystem.

In Article 72, it is further affirmed that nature has the fundamental right to restoration. Such right does not coincide with the obligation on natural and juridical persons or the state to indemnify the people and the collectives that depend on the natural systems; it is a right that the planet enjoys on its own and therefore any damages must be calculated separately from those suffered by persons depending on natural systems.

In cases of severe or permanent environmental impact, including that caused by the exploitation of non-renewable natural resources, the state will establish the most efficient mechanisms for restoration, and will adopt adequate measures to eliminate or mitigate harmful environmental consequences. As for the connection between the environment and the participatory mechanisms, the Constitution states the substantial equality of all the peoples and communities. There is no explicit connection between environment and participation at the constitutional level, but the clear and new statement in Chapter 2 of the 'Rights of the good way of living' includes the human right to water as the essential and therefore unalienable strategic asset for use by the public.

The category of right of the good way of living includes the right to safe and permanent access to healthy, sufficient and nutritional food, preferably produced locally and in keeping with the population's various identities and cultural traditions. Also, the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (*sumac kausay*, in the indigenous language) is recognised. Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage and the recovery of degraded natural spaces are also declared matters of public interest.

In conclusion, the three cases of Norway, Bolivia and Ecuador, although diversified in their approach and implementation, can offer a valid argument in favour of the positive effects of environmental rights' constitutionalisation. The approach is certainly centralised

in the hands of the institutions, but this does not preclude that a bottom-up approach can be integrated in the system and contribute to add value to the legal provisions that are approved. Such a possibility is less remote than one may think in the case of Canada, where the indigenous groups are highly developed in the elaboration of principles that could help give content and life to the constitutional legal provisions protecting the environment. The indigenous principles could not only offer a genuine and rooted substance to the environmental protection but could also be used as a restoration tool, when lifted to the highest level of protection.

6. The Secwépemc community

One of the underlying ideas of this article is that a system works at its best when the connection of the centre and of the periphery are sound and solid and when a top-down approach is efficiently integrated with bottom-up initiatives. In the final part of the article, a case study of a well-established participatory model offered by the Secwépemc community is provided, to show how important it is to give relevance to such initiatives and cover them under the same regulatory umbrella that only a constitutional provision could provide.

The illustrated cases of Bolivia and Ecuador show that it is possible and also logical, right and necessary to ground fundamental constitutional principles on the aboriginal law foundations, that the top-down approach of constitutionalisation can have its vital nourishment from the indigenous and local wisdom. Similarly, in Canada, constitutionalisation of native rights is a logical, right and necessary process, considering the obligations to restore the violations, as well as to give credit to an ancient wisdom from which we can only learn.

The ultimate way to heal ancient wounds effectively is by means of incorporating the violated wisdom in the highest law. From the study on the Secwépemc community emerges the crucial role played by the interconnections between people, land and resources as the social fabric of the legal culture of the community.[27] In the Secwépemc vision, decisions connected with the natural world are grounded on the connection and responsibilities that the people have with their land and towards their land. More specifically, when it comes to the Secwépemc bond with their land (including animals, plants, water and specific places), one of the grounding concepts is the so-called 'qwenqwent', intended as the humility and human dependency on the land, as the key to understanding legal principles and practices of respectful relations. Stories and community witnesses also teach of interconnection within an environment that sustains human and non-human beings alike. A relationship with the land characterised by the concepts of 'qwenqwent' and interconnection develops legal responsibilities that sustain such relations. Also, the above-mentioned principle of self-determination as one of the grounding foundations for affirming indigenous peoples' fundamental rights is anchored on the same premises, that is to say on the deep connection between the peoples and the environment in which they live.

In the Secwépemc legal tradition, individuals are expected to learn from the land, and teach others about the land, in order best to understand Secwépemc laws. From this knowledge comes a responsibility to follow or apply these laws in daily life. One important expression of law with regard to land and resource use is that people should not seek to obtain more or other resources if there is no genuine need. The people belonging to the Secwépemc community also have a responsibility to protect the land and ensure that non-human beings are able to sustain themselves and future generations through healthy seasonal and reproductive rhythms. According to the Secwépemc law, legal responsibilities are designed to nurture and protect the rights the land and all its beings share. These rights are the other side of the responsibilities mentioned above: the right not to be over-harvested, for example, or the right to protection and self-sustainability.

A system where rights and responsibilities are established in order to safeguard the balance between human beings and nature is certainly reproducible in constitutional terms and it may benefit not only the indigenous communities, but the totality of the population as well.

Further developing the concept of self-determination as the monitor to check the soundness of the external relationships, the Secwépemc law asserts that other groups are to be recognised as self-governing entities. Within this recognition, however, the different groups are seen as interdependent; the actions of each will impact on the lives and choices of others. Territorial groups, therefore, have the responsibility to maintain relations of mutual benefit and respect, including communicating and listening to each other's laws, interests, and needs. Guests and hosts have different obligations in this regard. Resources should be shared when requests are properly made, and also when a need or inequality arises. These responsibilities are mirrored in the rights that the Secwépemc law envisions, both in favour of guests and other territorial groups, including the right to be protected and the right of outside groups to

27 'Secwépemc: Land and Resources' Law Research Project, compiled by the Indigenous Law Research Unit Team (2016).

have access to the resources that the external group may need.

In a nutshell, from the Secwépemc case study emerges the holistic vision that the indigenous community has with regard to both nature and the territorial groups: each native group has a deep connection with both the natural world and the other groups and such connection – which finds its correspondents respectively in the principle of internal and external self-determination. Such a comprehensive net of connections does not collide with the Western principles of environmental protection, rights, duties and responsibilities.

The constitutional recognition of such principles, by enshrining the environmental rights and duties in the constitution will mark a major step forward for the indigenous rights restoration process and a better enforcement of those laws and enhanced public participation in environmental governance.[28]

There are many sources of indigenous law that hold great insight for reconciliation and the case of the Secwépemc community is just one example how to provide constitutional environmental laws with fundamental principles based on indigenous wisdom. Such a key role played by indigenous knowledge offers the opportunity to entrench in the constitution the fundamental principles of nature and human integrity, as well as to codify duties and responsibilities towards nature with the common aim to protect the natural world and the human beings that deeply depend on it. Prioritising indigenous wisdom to give content to constitutional environmental provisions can help heal the wounds that economic growth and progress have created for the indigenous communities and Mother Nature.

7. Conclusion

This study shows that one of the major duties of legal scholars, practitioners and decision-makers is to provide answers and effective protection to endangered groups and entities, such as the natural world and the communities whose existence is intimately related to the integrity of the environment.

A positivistic approach that sets the fundamental rights down in black and white is neither naïve nor outdated. On the contrary, the examples offered by Norway, Bolivia and Ecuador show that concerted efforts, where top-down initiatives are complemented by the voices of the targeted groups, are leading benchmarks to initiatives that aim to protect the environment by giving substance to ancestral principles and wisdom too often disregarded if not profoundly violated.

Setting the ancient aboriginal wisdom in black and white is the only way to grant it long-lasting protection, as well as partially to offer moral restoration for severely threatening it. Only offering the highest level of protection to the most neglected peoples fulfils the ancient saying 'as above, so below', which can be condensed in the formula of an integrated top-down and bottom-up approach.

28 David R Boyd 'Should environmental rights be in the constitution? Enshrine our right to clear air and water in the Constitution' (2014) *Policy Options* http://policyoptions.irpp.org/fr/magazines/opening-eyes/boyd-macfarlane/; David R Boyd *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012).